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CURRENT TOPICS.

Where an officer in his return of a sale of an equity upon execution declares that he published in a certain newspaper the notice which the statute requires to be given, it is held by the Supreme Court of Maine, in *True v. Emery*, 17 Am. L. R. 156, not competent for the debtor, or any one claiming under him, to contradict the officer's return by the production of such newspaper, showing the return to be untrue. "If," the court say, "it was admitted by the respondents to have been the notice in fact given, the point would have been open. But the respondents refuse to admit it, and rely upon the return of the officer, that he gave due and legal notice, as conclusive." The sworn return of the officer is conclusive. The rule is very general. The exceptions are very rare, and this case is not one of them. Blanchard v. Day, 31 Me. 494, 496; Grover v. Howard, Id. 546; Huntress v. Tiney, 39 Id. 237; Bunker v. Gilmore, 40 Id. 88; Dutton v, Simmons, 65 Id. 583; Pullen v. Haynes, 11 Gray, 379. In Sykes v. Keating, 118 Mass. 517, the officer's return set out that the notice of sale was of land on Union street in a city, and it was held that evidence that in the published notice of sale the premises were described as situated on Avon street was not competent to contradict the return. The remedy is against the officer for a false return.

The Supreme Court of the District of Columbia, in *Barton v. Barbour*, 1 Month. Jur. 645, held, following the rulings of the Supreme Court of the United States, that a receiver could not be sued without leave of the court under whose authority he holds his office. McArthur, J., said: "The plea demurred to (that the defendant was a receiver, and that the plaintiff had not obtained leave to sue him from the court by which he had been appointed), would probably not be sustained in the state of Vermont, because the courts of that state appear to have decided that a receiver operating a railroad as a common carrier would be liable in an action for damages occasioned by any breach of his obligation while acting in that capacity. In Paige v. Smith, 99 Mass. 395, this doctrine is imputed to the courts of that state; and it is held that a receiver appointed there would by equally liable to an action in the courts of another state for a similar cause of action, instituted without the permission of the court appointing the receiver. In Kinney v. Crocker, 18 Wis. 74, and Allen v. The Cent. R. R. of Iowa, 3 Cent. L. J. 434, the same rule is asserted. With the exception of these authorities, it is not too much to say that the decisions in England and the United States are to the effect that it is requisite to apply to the court of chancery in which the receiver was appointed, when a suit is to be brought against him in his official capacity. This rule is established by so many authorities, that citation is scarcely necessary. The briefs of counsel are sufficiently full of such references. The possession of the receiver is considered that of the court, and it is therefore regarded as the duty of the court to protect the possession of its officer from the invasion of persons or suits at law. Any party may come into court and test the justice of any claim he has upon the fund, and he may be himself examined *pro interesse suo*. If he has a prior interest it will be protected, and he will be permitted to bring such suits at law as may be proper to determine any legal or equitable rights he may have upon the estate. The court of chancery having acquired jurisdiction of the subject-matter, will retain it for the benefit of those who may be found ultimately entitled to it. 2 Story's Eq. J., secs. 331 to 334; Parker v. Browning, 8 Paige, 388."

In *Weeks v. N. Y. & C. R. R.*, recently decided by the New York Court of Appeals, the plaintiff sued for the value of certain bonds stolen from him while a passenger on defendant's railroad. The car in which he was seated had been detached from the rest of the train, and had been left by the employees without any protection from outsiders. While thus situated several men entered it, and knocking the plaintiff down, robbed him of the bonds which he carried in his pocket. On the trial he obtained a verdict for their value, which was reversed on appeal, the court saying:

"No authority has been cited, nor has any been found, extending the liability of a carrier of passengers or their baggage so far as to include a loss incurred under the circumstances shown in this case." The ground upon which the carrier was held not liable was that the property was not placed in its charge, nor had it notice of its existence. In the case of Tower v. Utica and Schenectady Railroad Co. 7 Hill 47, in Grosvenor v. New York Central Railroad Co. 39 N. Y. 34, the general principle was approved, rendering it necessary to support the liability of the carrier that the property lost should be placed in its custody. For that reason chiefly the passenger was prevented from receiving the value of the contents of his portmanteau which he had taken into his apartment with him, and carelessly left it there during the period of a temporary absence, Great Western Railway Co. v. Talley, 23 Law Times' Reports 413, and in the First National Bank v. R. R. Co. 20 Ohio 259, it was held to preclude a recovery for money carried upon the person of a passenger and destroyed by means of an accident to the train in the course of the journey. It was there said that the passenger "could not reasonably have supposed that the defendant by selling him a ticket, and agreeing to carry him and his baggage with due care, contemplated incurring a liability in respect to a large sum of money of which defendant had no knowledge, and which he was carrying solely for the purpose of transporting it from one place to another." Id., 280. And the same disposition was made of a claim for the loss of money carried to purchase clothing in Hiscox v. Narr. Railroad Co., 2 Conn. 281. Articles of merchandise, or samples of them, and large amounts of money are not on a mere passenger's ticket carried at the risk of the carrier. Jordan v. Fall River R. R. Co., 5 Cush. 69, and cases referred to in the opinion. Merrill v. Grennell, 30 N. Y. 594; Dexter v. Syracuse & Bing. R. R. Co., 42 N. Y. 326; Dunlap v. Int. S. Boat Co., 98 Mass. 371; Dibble v. Brown, 12 Ga. 217. As to the obligation of the carrier to exercise the utmost diligence in maintaining order and guarding passengers against violence, see Putnam v. Seventh Ave. R. R., 55 N. Y. 108; Crocker v. Chicago & C. R. R., 36 Wis. 657; Balt. & Ohio R. R. v. Blocker, 27 Md. 277; N. O., St. L. & Ch. R. R. v. Burke, 4 Cent. L. J. 539.

THE decision of the English Court of Appeal, in the somewhat notorious case of *Reg. v. Bradlaugh et al.*, reversing the ruling of Chief Justice Cockburn, who, on the trial, held the indictment good, although the words of the obscene publication, for which the defendants were indicted, were not set out, is in accordance with the general rule that the facts and circumstances which constitute an offense must be stated with such certainty and precision that a defendant may be enabled to judge whether they constitute an indictable offense or not, and that there may be no doubt as to the judgment to be given if he should be convicted. The English cases which most resemble this are Zenobio v. Axtell, 6 T. R. 162, where it was held that a declaration for a libel in a foreign language must set out the original words, and Reg. v. Lloyd, 2 East. 1,122, where it was held that a threatening letter must be set out in full. The American decisions so far as the general rule is concerned are to the same effect, but our courts, in the case of obscene publications, have made an exception which the English Court of Appeal failed to adopt. "It can never be required," say the Supreme Court of Massachusetts, in Com. v. Holmes, 17 Mass. 336, "that an obscene book or picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient." So, also, in the Supreme Court of Michigan, in People v. Saradin, 1 Mich. 91: "There is another rule as ancient as that contended for by the counsel for the prisoner, which forbids the introduction in an indictment of obscene pictures and books. Courts will never allow their records to be polluted by bawdy and obscene matters." And Tighlman, C. J., in Commonwealth v. Sharples, 2 Searg & Rawle, 100, says: "I am for paying some respect to the chastity of our records." In Commonwealth v. Tarbox, 1 Cush. 66, it is said: "In indictments for offenses of this description, it is always necessary that the contents of the publication should be inserted; but whenever it is necessary to do so, or whenever the indictment undertakes to state the contents, whether necessary or not, the same rule prevails as in the case of libel; that is to say, the alleged obscene publication must be set out in the very words of which it is composed,

and the indictment must undertake, or profess to do so, by the use of appropriate language. The excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and, then, the statement of the contents may be omitted altogether, and a description thereof substituted; but in this case a reason for the omission must appear in the indictment by proper averments." See, also, State v. Harmon, 23 Tex. 232; State v. Brown, 1 Williams (Vt.), 619.

LEASES FOR YEARS RENEWABLE FOREVER.

Though the distinction between real and personal property is, ordinarily, a very obvious one, yet there are circumstances under which it becomes a question of the greatest nicety whether a given article falls within the one class or the other. This is notably so in case of questions arising under the law of fixtures. So, also, although it is usually perfectly obvious that a lease of realty for years is personal property, yet when we come to consider the case of so-called perpetual leases, leases for ninety-nine years renewable forever, it becomes difficult to say why they are not real property.

The test by which to determine whether an estate in land is realty or personalty is the certainty or uncertainty of its duration. An estate for a term uncertain, no matter how short, is realty; and although originally leases could not be made for a term to endure beyond a generation, forty years, Coke Litt. 45b, 46a, Theobalds v. Duffoy, 9 Mod. 101, yet it is now settled that a lease of land for a term certain, of no matter how many years duration, is good, and is but a chattel. This distinction between real and personal estate in land, based on the certainty or uncertainty of the duration of the tenure, is essentially a feudal one, made arbitrarily, on no principle save that of caste, at a time when only the warrior was thought worthy to own land, and the husbandman, who merely tilled instead of killed, could hold nothing higher than an estate for years—a chattel. But even if this test of certainty or uncertainty of the duration of the term, founded as it is on feudal distinctions, is to be retained in this country, yet when it is applied to the case of a lease for ninety-nine years renewable forever, it fails to show it personalty, for it is difficult to imagine anything more uncertain than the length of time that such a lease may endure. Such a lease has both of the essential qualities which distinguish real from personal property; immobility of the subject matter, and a legal indeterminate duration of estate. 2 Black. 385. Speaking of a lease for two thousand years, Lord Mansfield says, 1 Cowper, 599: "No man holds such a lease as a lease," and the Supreme Court of Massachusetts, speaking of one for nine hundred and ninety-nine years, in Montague v. Smith, 13 Mass. 396, say, that "it is to all imaginable purposes a fee clogged with a ground rent." These were only leases for a long term, but a term certain; and when we come to take such a lease and add to it the elements of uncertainty of duration of the term by making it renewable forever, why should it not be so viewed as to make it technically, as well as practically, a fee granted upon fee farm rents? Such fees, though not common, have been recognized in the law of this country. Adams v. Bucklin, 7 Pick. 121; Alexander v. Warrance, 17 Mo. 228; Farley v. Craig, 6 Halst, 262; Wartenby v. Moran, 3 Call, 491; Scott v. Lunt, 7 Peters, 596; Van Rensselaer v. Hays, 19 N. Y. 68; Wallace v. Harmstad, 44 Penn. St. 492; and leases granted to endure "as long as wood grows, and water runs," have been declared to pass the fee subject to a rent charge. Arms v. Burt, 1 Vt. 303; Stevens v. Dewing, 2 Vt. 411.

Indeed, it would seem that unless a lease for ninety-nine years renewable forever is held to be a fee subject to a ground rent, it can not be sustained at all, and must be void within the doctrine against perpetuities. The rules against perpetuities apply to leases, 1 Washburn on Real Prop. 439, and such a lease has been held within them, and void, in Morrison v. Rossignol, 5 Cal. 64. In granting such a leasehold, the lessor either grants an entire estate which may endure forever, or he grants an estate for ninety-nine years with the covenant to renew it, to grant another just like it, at the expiration of every ninety-nine years, to the end of time. If every renewal is *not* the creation of a new estate, then the original estate granted is one in perpetuity, subject to a condition subsequent that it shall determine if the holder shall fail to do either of two

things, namely: elect to renew at the end of any ninety-nine years, or pay the rent; a base fee, perhaps, but still an estate in land which may endure forever, and, therefore, a fee. If each renewal *is* the creation of a new estate, then the covenant to renew forever is void, as it is for the creation of a series of estates, one of which must, in time, certainly take effect beyond the period of "a life or lives in being and twenty-one years after."

That such a lease is practically a fee is patent, and the objections against holding it technically something else are numerous. Thus, if the holder of one of these leases, to all imaginable purposes a fee, were to die out of the state where the land lies, it would, as to distribution, be governed, not by the *lex loci rei sitæ*, but by the *lex fori*. In leases of this kind, the lessee's estate usually becomes the really beneficial and valuable one, as compared with the estate of the lessor; but if the lessee should, by any mischance, have the life estate in the reversion cast upon him, as by curtesy, the leasehold, the estate most worth having, would be merged in it. 1 Washburn on Real Prop., 465. Lord Bacon remarks, Law Tracts, 331, that "it is the common byword of the law, that the law favoreth three things; life, liberty and dower;" but if such a lease is a chattel, then unless widows are by statute made dowable of such estates, they can be deprived of their dower altogether. All that is necessary is, that when a man buys land, instead of taking a fee, he should, while paying the price of one, take a lease for ninety-nine years, renewable forever at the annual rent, say of a peppercorn; then holding a chattel he would have all the benefit of a fee, relieved of the burden of dower. By the same means the laws of descent could be evaded. Again, any owner of land could grant it to a beggar, taking back a lease renewable forever at a nominal rent. Now in cases of leases for years the lessor is liable for the taxes. Taylor on Land. and Ten., § 341. But if an estate is thus held, the lessor's personal responsibility for taxes would amount to nothing, and if the land were offered for sale for taxes, as it never would yield anything, no one would buy it, and it would eventually be forfeited to the state. That is to say, unless the leasehold was made realty for purposes of taxation, the land would simply be exempt. The same reasons which exist for making judgments liens on land without a levy, exist to make them liens on such leaseholds; and the same reasons of convenience and safety, which make recording desirable when lands are sold, require it in case of the assignment of such a lease.

These are probably some of the reasons which led to the passage of the statutes found in many of the states some making leases which have more than a certain number of years to run, realty, as in Massachusetts, others declaring leases renewable forever to be real estate for certain purposes, as in Ohio. In the latter state permanent leaseholds are, by statute, made real estate for purposes of descent and distribution, of sales on execution, and judgment liens. But in passing upon their nature, the courts have gone beyond the terms of the statute, and have declared them real estate for all purposes. In Murdock v. Reed, 1 Disney 274, a husband was held to be entitled to curtesy in the perpetual leasehold lands of his wife, though the estate by curtesy comes neither by descent nor on distribution. In Loring v. Melendy, 11 Ohio 355, the court say: "To withdraw permanent leasehold estates from their anomalous position between chattels and realty, and by calling them what in truth they are, lands, we relieve them from all doubt as to the principles and laws which shall control them, and assign to them a certain and fixed place in the law. A permanent leasehold estate is not a chattel, but is, in truth, land carrying the fee. Such is the nature of the estate, and so it has been considered and treated in the legislation of our state. We, therefore, declare that permanent leasehold estates are lands, subject to all the rules and laws which attach to land for all purposes."

In Worthington v. Hewes and McCann, 19 Ohio St. 66, where it was held that, after assignment of his interest, a lessee, under a lease renewable forever, was not liable on his covenant to pay rent, the court say: "The nature of the estate forbids any such construction" (as would make him liable). "For all substantial purposes it is a leasehold estate in name and in form only. The lessor, in effect, parts at once with his entire estate, for a stipulated consideration in money, payable in specified installments, and secured by a lien on the land; and the lessee takes the entire estate, an estate of inheritance, subject only

to the payment of the money. In form merely is it a chattel; it is in fact an estate in fee."

Since, therefore, by holding such leaseholds to be personalty, the laws relating to dower, curtesy and taxation of land, can be evaded; since the policy of making judgments liens on land, and requiring conveyances of land to be recorded, applies with equal force to such leases, and, above all, since they possess the two indispensible qualities of realty, immobility of the subject matter, and an indeterminate duration of estate, it is submitted that such leaseholds are, in fact, as well as in form, technically, as well as practically, real estate, estates in fee. G. H. W.

LIBEL—GENERAL ISSUE—EVIDENCE.

STOREY v. EARLY.

Supreme Court of Illinois.

[Filed February 7th, 1878.]

HON. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

1. LIBEL—GENERAL ISSUE—EVIDENCE—In an action for libel, where the defendant pleads the general issue and does not justify, evidence tending to prove the truth of the charge or of circumstances which, in the popular mind, tend to cast suspicion upon the plaintiff is inadmissible. But where defendant offered evidence showing that the plaintiff was an estimable young woman, and that two letters purporting to have been written by two respectable citizens of the town where she lived were received through the post-office by defendant, which letters were forgeries, and thereby he was imposed upon and induced to print the charges therein contained; that no one had ever heard of the charges until then, but on the contrary they excited universal indignation, which the trial court rejected: *Held*, error, as the proof offered did not fall within the above rule. CRAIG, SCOTT and SHELDON, J.J., dissenting.

2. LIBEL—DAMAGES—WEALTH AND STANDING OF DEFENDANT.—An instruction that in fixing the amount of damages to be awarded as compensation to plaintiff for the injury she has sustained, "the wealth and standing of defendant might properly be considered," is improper. Per BREESE, J.

3. "THERE IS A CLEAR DISTINCTION between a publication of a slanderous matter in a newspaper as matter of news, and the publication of slanderous matter upon the personal truthfulness and responsibility of the defendant." Per BREESE, J.

BREESE. J., delivered the opinion of the court:

In the case of Regnier v. Cabot, 2 Gilm, 38, this court, apparently with great care, laid down, as a rule of law, in actions of this kind, "that where a defendant does not justify he may mitigate damages in two ways only—first, by showing the general bad character of the plaintiff; and, second, by showing any circumstances which tend to disprove malice, but do not tend to prove the truth of the charge." Before that time it had been a question whether, under the general issue, the defendant could be permitted to show specific facts, which tend to cast suspicion of guilt upon the plaintiff, upon which (it is there said), there had been a conflict of authority. The authorities in other states and in England were, in that case, examined, and the rule with its qualifications was laid down, as stated above. In an earlier case, Young v. Bennett, 4 Scam. 46, it had been decided, where defendant had pleaded the general issue to the whole declaration, and justified as to part of the counts, that it is not competent to prove in mitigation of damages "that a particular rumor prevailed in the neighborhood that plaintiff was guilty of the charge." In Sheahan v. Collins, 20 Ill. 328, the rule laid down in Cabot's case, *supra*, was again laid down and applied. That action was for libel, and it was then held incompetent to show that the libelous article had appeared in another newspaper in the city shortly before its publication by the defendants. The qualification to the proposition that defendant, in such case, "may prove any circumstances which tend to rebut malice," is that if such circumstances tend to prove the truth of the charges expressed in the slander or libel, the proof must be rejected, This qualification excludes not only such circumstances as the law recognizes as competent evidence tending to prove the truth of the charge, but all circumstances which, in the popular mind, tend to cast suspicion of guilt upon the plaintiff.

There can be no question that the proof offered in the case at bar and hereinafter mentioned, tends to rebut the inference of actual malice in the defendant. The turpitude of the publication of matter believed to be true is plainly of a character much less malignant than that of the publication of the same matter when known to be false, and less than the publication of the same matter without *any* reason to suppose it to be true. The proof offered plainly did tend, in some degree, to rebut malice. It tended to reduce the offense of defendant from that of vindictive, virulent malice, or that of utter recklessness, to that of a want of proper care in ascertaining the truth before publication. It was, therefore, competent, unless it be excluded by the qualification to the rule.

The question in this case is, did the proof so offered tend to cast suspicion of guilt upon the plaintiff? If so, it was properly rejected by the circuit court; if not, it ought to have been admitted. The substance of what defendant offered to show to the jury was, that plaintiff was a worthy and estimable young woman, living in Rockford, Illinois, and that two letters purporting to be written by two respectable citizens of Rockford were forged by some unknown person and sent through the post-office to defendant in Chicago, and that defendant was thereby imposed upon and induced

to publish the libelous article at the time, supposing the charge to be true, and that no one in Rockford had ever heard a suspicion of the purity of plaintiff until the publication of defendant, and that the publication excited universal indignation. Does this statement tend in the slightest degree to excite in the minds of the jury, the bystanders or the public a suspicion of the probability of guilt on the part of the plaintiff—we think not. On the contrary, it furnishes a vindication of her purity more complete than could any verdict of a jury—saying merely, "she was innocent and the publication malicious." The proof here offered differs from the case of an attempt to prove that rumors in support of the charge were in circulation before the publication, and from the case where it was proposed merely to prove that a like charge had been published in another journal. Proof that prior rumors existed, or that a prior publication of a charge had been made in another journal, would tend to excite in the minds of the jury a suspicion against the purity of plaintiff, and would tend to cast additional reproach upon the plaintiff. That would be simply a repetition of the slander with no accompanying antidote to neutralize the virus. In fact a statement by a defendant that rumors were prevalent against the chastity of a woman, or that an article charging impurity upon her had been published in a public journal, would constitute of itself ground for another action. Not so with the statement offered to be proved in this case. The publication of the statement offered in proof could not be made the subject of action by the plaintiff, for it in no way suggests to the mind a suspicion of impurity in her. In many cases the application of this rule of exclusion may be difficult. It may not be easy at all times to distinguish between that which is free from the suggestion of guilt in plaintiff and that which is not. The propriety of this exclusion of some matters, though they may seem to rebut malice, seems to rest upon the idea, that while the law will allow a guilty defendant to mitigate, if he can, the degree of his guilt, this is a privilege which must not be exercised, if to do so involves the necessity of casting reproach upon an innocent plaintiff who has done no wrong. The proof on this point offered in this case, taken as a whole, tended in no degree to cast additional reproach upon the plaintiff, and ought to have been admitted.

The sixth instruction for plaintiff was improperly given—it in substance says to the jury that in fixing the amount of damages to be awarded as *compensation* to the plaintiff for the injury she has sustained, "the wealth and standing of the defendant" might properly be considered. It is not perceived how the injury actually done to the plaintiff by the publication of this libel could be affected either by the wealth or standing of Wilbur F. Storey. This is not a slander uttered personally by the defendant, nor is the libelous matter contained in any communication having the sanction of his name. The extent of the circulation of the newspaper of defendant, and the character and standing of that newspaper for fairness, justice and truth might well be considered upon that question. The wealth of the publisher might be great and his social standing high, and yet the paper might be of such character as to exert but little influence upon the public mind. On the other hand the publisher might be insolvent, and his position in society very low, and yet the paper might be very attractive and have a very large circulation and enjoy the confidence of the public to such a degree for justice and truth, that statements in its columns might carry great weight. There is a clear distinction between a publication of slanderous matter in a newspaper as a matter of news, and the publication of slanderous matter upon the personal truthfulness and responsibility of the defendant. Again, the injury actually suffered in no sense is to be measured by the wealth of the defendant. It must be observed that this instruction does not relate to *vindictive* or *punitive* damages, but solely to compensatory damages. For the errors stated the judgment must be reversed and the cause remanded.

Reversed and remanded. CRAIG, J., dissenting.

WALKER, J.

I concur in this opinion, so far as it holds that the forged letters should have been admitted in evidence in mitigation of damages, but not as to what is said in regard to the instruction.

SCOTT, J., dissenting.

The libel, published in defendant's newspaper was a great wrong to the character of plaintiff. Its publication can not be justified or palliated for any reason or for any cause. It was not legitimate news fit for publication, and, if defendant wished to permit the scandalous matter to appear in the columns of his paper, he ought, in justice to the parties accused, to have first ascertained whether it was true or false, which he could have done in a few hours by the use of the telegraph. Not to do so shows a reckless disregard of the rights and feelings of innocent parties that might be affected by the publication of such defamatory matter. That part of the opinion by Mr. Justice Breese, which condemns an instruction given for plaintiff, is not concurred in by any four members of the court, and hence the views expressed have no sanction from the court. The only cause for reversing the judgment, which has the sanction of a majority of the court, is that the court below erred in excluding from the jury certain letters received, which it is said, contain the substance of the libelous publication. The fact that such letters were received was proven, and that the article published was based on them was also proven, and that was all defendant was entitled to prove in that connection. No other legitimate use could be made of the letters, and, indeed, the rulings of the court in that respect were quite favorable to defendant. It must be conceded that, under the former decisions of this court, if the signatures to the letters were genuine, or there had been no signature at all to them, such letters would not have been admissible in evidence. If they would tend to prove anything, it would be the truth of the libel, and that is not allowable under the plea of not guilty. How the fact the

signatures to the letters may be forgeries, can change the rule of law on this subject, is to me inexplicible. The introduction and reading of such letters, had the court permitted it, to the jury, in the presence of the court, would have been simply a repetition of the libel. Conceding the signatures to the letters were forgeries, the contents were nevertheless libelous and defamatory in the highest degree. Believing there is no error in the record, the judgment ought to be affirmed.

SHELDON, J., concurring with SCOTT, J.

RAILWAY NEGLIGENCE — PASSENGER — TRAVELING ON FREE PASS.

GRAND TRUNK R. R. v. STEVENS.

Supreme Court of the United States—October Term, 1877.

PLAINTIFF below was negotiating, at Portland, Me., with defendant below, a railroad company, for the introduction on its road of a patent car-coupling, and was requested by defendant to go to Montreal and see one of its officers there, defendant agreeing to pay his expenses. He was given a pass directing conductors to pass him from Portland to Montreal. The pass contained this condition: "The person accepting this free ticket in consideration thereof assumes all risk of all accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the property of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare." While traveling from Portland to Montreal, on this pass, on one of defendant's trains, plaintiff was injured by defendant's negligence. *Held*; 1. That plaintiff was carried for hire, in pursuance of an agreement, and not as a gratuitous passenger; 2. That it was not competent for defendant to stipulate against liability for its own negligence in such a case, and it was liable for the injury.

In error to the Circuit Court of the United States for the District of Maine. The facts appear in the opinion.

Mr. Justice BRADLEY delivered the opinion of court:

This was an action on the case for negligence, brought to recover damages for injuries received by the plaintiff (now defendant in error) whilst a passenger in the defendant's cars. The plaintiff, being owner of a patented car-coupling, was negotiating with the defendant at Portland, Maine, for its adoption and use by the latter; and was requested by the defendant to go to Montreal to see the superintendent of its car department in relation to the matter, the defendant offering to pay his expenses. The plaintiff consented to do this, and in pursuance of the arrangement, he was furnished with a pass to carry him in the defendant's cars. This pass was in the usual form of free passes, thus: "Pass Mr. Stevens from Portland to Montreal," and signed by the proper officer. On its back was the following printed indorsement:

"The person accepting this free ticket in consideration thereof assumes all risk of all accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare."

The plaintiff testified that he put the pass into his pocket without looking at it, and the jury found specially that he did not read the indorsement previous to the accident, and did not know what was indorsed upon it. He had been a railroad conductor, however, and had seen many free passes, some with a statement on the back, others without.

During the passage from Portland to Montreal, the car in which the plaintiff was riding ran off the track and was precipitated down an embankment, and the plaintiff was much injured. The direct cause of the accident, according to the proof, was that at the place where it occurred, and for some considerable distance in each direction, the bolts had been broken off the fish-plates which hold the ends of the rails together, so that many of these plates had fallen off on each side, leaving the rails without lateral support. The consequence was that the track spread, and the cars ran off as before stated. There was also evidence that at this place the track was made of old rails patched up.

The above facts appeared on the plaintiff's case, and the defendant offered no evidence, but requested the court to instruct the jury as follows:

1. That if the plaintiff, at the time of sustaining the injury, was traveling under and by virtue of the pass produced in evidence in the case, he was traveling upon the conditions annexed to it.

2. That if the plaintiff, at the time of sustaining the injury, was traveling under and by virtue of the pass produced in evidence in the case, the defendants are not liable.

3. That if the plaintiff, at the time of sustaining the injury, was traveling as a free passenger, the defendants are not liable.

4. That if the plaintiff, at the time of sustaining the injury, was traveling as a gratuitous passenger, without any consideration to the defendants for his transportation, the defendants are not liable.

The court refused these instructions as inapplicable to the evidence produced, and instructed the jury as follows, viz:

That if the jury find that in May, 1873, the plaintiff was interested in a car-coupling, which had been used on the cars of the defendant since December previous, and that the officers of the company were desirous that the plaintiff should meet them at Montreal, to arrange about the use of such couplings on their cars by defendant, and they agreed with him to pay his expenses if he would come to Montreal, and he agreed so to do, and took passage on defendant's cars, and was by the reckless misconduct and negligence of the defendant, and without negligence on his part, injured whilst thus a passenger in defendant's car, the de-

fendants are not exonerated from liability to plaintiff for his damages occasioned by such negligence, by reason of the indorsement upon the pass produced in evidence.

It is evident that the court below regarded the case as one of carriage for hire, and not as one of gratuitous carriage, and that no sufficient evidence to go to the jury was adduced to show the contrary; and hence, that under the ruling of this court, in the case of Railroad Company v. Lockwood, 17 Wall. 357, it was a case in which the defendant, as a common carrier of passengers, could not lawfully stipulate for exemption from liability for the negligence of its servants. In taking this view, we think the court was correct. The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, was not a matter of charity nor of gratuity in any sense. It was by virtue of an agreement, in which the mutual interest of the parties was consulted. It was part of the consideration for which the plaintiff consented to take the journey to Montreal. His expenses in making that journey were to be paid by the defendant, and of these, the expense of his transportation was a part. The giving him a free pass did not alter the nature of the transaction. The pass was a mere ticket, or voucher, to be shown to the conductors of the train, as evidence of his right to be transported therein. It was not evidence of any contract by which the plaintiff was to assume all the risk; and it would not have been valid if it had been. In this respect it was a stronger case than that of Lockwood. There the pass was what is called a "drover's pass," and an agreement was actually signed, declaring that the acceptance of the pass was to be considered as a waiver of all claims for damages or injury received on the train. The court rightly refused, therefore, in the present case, to charge that the plaintiff was traveling upon the conditions indorsed on the pass; or that, if he traveled on that pass, the defendant was free from liability. And the court was equally right in refusing to charge, that if the plaintiff was a free, or gratuitous passenger, the defendant was not liable. The evidence did not sustain any such hypothesis. It was uncontradicted, so far as it referred to the arrangement by virtue of which the journey was undertaken.

The charge actually given by the court was also free from material error. It stated the law as favorably for the defendant as the latter had a right to ask. If subject to any criticism, it is in that part in which the court supposed that the jury might find that the plaintiff was injured by the reckless misconduct and negligence of the defendant. If this degree of fault had been necessary to sustain the action, there might have been some difficulty in deducing it from the evidence. However, the condition of the track where the accident took place, without any explanation of its cause, was perhaps sufficient even for such an inference. If the defendant could have shown that the injury to the rails was the result of an accident occurring so shortly before the passage of the train as not to give an opportunity of ascertaining its existence, it did not do so; but chose to rest upon the evidence of the plaintiff. In fact, however, negligence was all that the plaintiff was bound to show; and of this there was abundant evidence to go to the jury. On the whole, therefore, we think that the charge presents no sufficient ground for setting aside the verdict. The charge, if not formally accurate, was not such as to prejudice the defendant.

It is strongly urged, however, that the plaintiff, by accepting the free pass indorsed as it was, was estopped from showing that he was not to take his passage upon the terms therein expressed; or, at least, that his acceptance of the pass should be regarded as competent if not conclusive evidence that such a pass was in the contemplation of the parties when the arrangement for his going to Montreal was made. But we have already shown that the carrying of the plaintiff from Portland to Montreal was not a mere gratuity. To call it such would be repugnant to the essential character of the whole transaction. There was a consideration for it, both good and valuable. It necessarily follows, therefore, that it was a carrying for hire. Being such, it was not competent for the defendant, as a common carrier, to stipulate for the immunity expressed on the back of the pass. This is a sufficient answer to the argument propounded. The defendant being, by the very nature of the transaction, a common carrier for hire, can not set up, as against the plaintiff, who was a passenger for hire, any such estoppel or agreement as that which is insisted on.

Since, therefore, from our view of the case, it is not necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon the case of Railroad Company v. Lockwood. We have no doubt of the correctness of the conclusion reached in that case. We do not mean to imply, however, that we should have come to a different conclusion, had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked with apparent confidence, "May not men make their own contracts, or, in other words, may not a man do what he will with his own?" The question, at first sight, seems a simple one. But there is a question lying behind that: "Can a man call that absolutely his own, which he holds as a great public trust, by the public grant,, and for the public use as well as his own profit?" The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled. We deem it the safest plan not to anticipate questions until they fairly arise and become necessary for our decision.

The judgment of the Circuit Court is affirmed.

ASA BIGGS died at Norfolk, Virginia, on the 6th inst., aged sixty-eight. He had been a member of Congress for several terms, United States Senator and United States District Judge for North Carolina.

MUNICIPAL BONDS.

CROMWELL v. COUNTY OF SAC.

Supreme Court of the United States, October Term, 1877.

1. MUNICIPAL BONDS—EFFECT OF OVER-DUE COUPONS.—Where to a municipal bond which has several years to run, an over-due and unpaid coupon for interest is attached, that fact does not render the bond and the subsequently maturing coupons dishonored paper, so as to subject them, in the hands of a purchaser for value, to defenses good against the original holder.

2. NEGOTIABLE PAPER — BONDS PAYABLE TO BEARER.—A *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin; the only exceptions being where the paper is absolutely void for want of power in the maker to issue it, or where the circulation is prohibited by law for the illegality of the consideration. Municipal bonds payable to bearer are negotiable instruments, and subject to the same rules as other negotiable paper.

3. A PURCHASER OF A MUNICIPAL BOND from a *bona fide* holder, who had obtained it for value before maturity, takes it equally freed as in the hands of such holder, though he may have had notice of infirmities in its origin.

4. A PURCHASER OF A NEGOTIABLE SECURITY before maturity, unless personally chargeable with fraud in the purchase, can recover the full amount of the security against the maker, though he may have paid less than its par value, whatever may have been its original infirmity.

5. WHEN THE RATE OF INTEREST AT THE PLACE OF CONTRACT differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern.

6. INTEREST— JUDGMENTS ON BONDS.—Municipal bonds in Iowa, drawing ten per cent. interest before maturity, draw the same interest, under the law of the state, after maturity, and coupons attached to such bonds draw six per cent. after maturity. Judgments in that state entered upon such bonds and coupons draw interest for the amount due on the bonds at the rate of ten per cent. a year, and upon the amount due upon the coupons at the rate of six per cent. a year.

In error to the Circuit Court of the United States for the District of Iowa.

John M. Rogers, for plaintiff in error; *Galusha Parsons*, for defendant in error.

Mr. Justice FIELD delivered the opinion of the court.

This case was before us at the last term, and the judgment of the court below was then reversed and the cause remanded for a new trial. 94 U. S. Rep. 351; 4 Cent. L. J. 416. Upon the new trial a special verdict was found by the jury, and the questions presented for our determination now relate to the judgment which those findings authorize.

The action was brought upon four bonds of the county of Sac, in the state of Iowa, each for $1,000, and four coupons for interest attached to them, each for $100. The bonds were issued on the 1st of October, 1860, and were made payable to bearer on the 1st of May, in the years 1868, 1869, 1870 and 1871, respectively, at the Metropolitan Bank, in the city of New York, with annual interest at the rate of ten per cent. a year. The coupons in suit matured after the 1st of May, 1868. They were, at the option of the holder, payable at the same bank in New York, or were receivable at the office of the treasurer of Sac county for county taxes.

As a defense to this action, the county relied upon the estoppel of a judgment rendered in its favor in a prior action, brought by one Samuel C. Smith, upon certain earlier maturing coupons upon the same bonds, accompanied with proof that the present plaintiff, Cromwell, was at the time the owner of the coupons in controversy in that action, and that the action was prosecuted for his benefit. It appeared from the findings in that action that the county of Sac had authorized, by a vote of its people, the issue of bonds to the amount of $10,000 for the erection of a court-house; that the bonds were issued by the county judge, and delivered to one Meserey, with whom he had made a contract for the erection of the court-house; that immediately thereafter the contractor gave one of the bonds as a gratuity to the county judge; and that a court-house was never constructed by the contractor or any other person pursuant to the contract. It also appeared that the plaintiff had become the holder before maturity of the coupons in controversy, but it did not appear that he had ever given any value for them. Upon these findings the court below held that the bonds were void as against the county, and accordingly gave judgment in its favor upon the coupons. Any infirmity of the bonds for illegality or fraud in their issue, necessarily affected the coupons attached to them. When that case was brought here on writ of error, this court held that the facts disclosed by the findings were sufficient evidence of fraud and illegality in the inception of the bonds to call upon the holder to show, not only that he had received the coupons before maturity, but that he had given value for them, and not having done so the judgment was affirmed.

When the present case was first tried, the court below held that the judgment in the Smith case was conclusive against the plaintiff, and refused to permit him to prove that he had received the bonds and coupons in this suit before maturity, for value, and gave judgment for the county. But when the case was brought here at the last term, we held that the court below erred in refusing to admit this proof; and that the matters adjudged in the Smith case were only that the bonds were void as against the county in the hands of parties who had not thus acquired them before maturity and for value. The judgment was accordingly reversed.

Upon the second trial, the plaintiff proved that he had received two of the bonds in suit—those payable in 1870 and 1871—with coupons attached, before their maturity, and given value for them without notice of any defense to them on the part of the county. Under our ruling there can be no

doubt of his right to recover upon them. The only questions for our determination as respects them relate to the interest which they shall draw after maturity, and the interest which the judgment shall bear. These questions we shall hereafter consider.

As to the other two bonds in suit—those payable in 1868 and 1869—and coupons annexed, it appears that the plaintiff purchased them from one Clark, on the 1st of April, 1873, after their maturity, for the consideration of a precedent debt due to him from Clark, amounting to $1.500; that they had previously been held by one Robinson, who had pledged them to a bank in Brooklyn as collateral security for a loan of money; that Clark purchased them of Robinson on the 20th of May, 1863, by paying this loan to the bank, then amounting to $1,192, and applying the excess of the amount of the bonds over the amount thus paid, in satisfaction of a precedent debt due to him by Robinson. To each of these bonds there were attached, at the time of Clark's purchase, the coupon due on the first of the month and all subsequent unmatured coupons. Robinson stated to Clark that the coupons previously matured had been paid, and that those due on the first of the month would be paid in a few days. Clark had no notice at the time of any defense to the bonds, except such as may be imputed to him from the fact that one of the coupons attached to each of the bonds was then past due and unpaid. And the principal question for our determination is whether, this fact existing, the plaintiff had, as to these bonds, the right of a holder for value before dishonor, without notice of any defenses by the county; or, as stated by counsel, whether this fact rendered the bonds themselves, and all subsequently maturing coupons dishonored paper, and subjected them in the hands of Clark and the plaintiff succeeding to his rights to all defenses good against the original holder. The judges of the circuit court were divided in opinion upon this question, and as in such cases the opinion of the presiding judge prevails, the decision of the court was against the plaintiff, and he was held to have taken the bonds and subsequent coupons as dishonored paper, subject to all the infirmities which could be urged against them in the hands of the original holder. In this decision we think the court erred. The special verdict does not show that the coupons over-due had been presented to the Metropolitan Bank for payment, and their payment refused. Assuming that such was the fact, the case is not changed. The non-payment of an installment of interest when due could not affect the negotiability of the bonds, or of the subsequent coupons. Until their maturity, a purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities. The non-payment of the installment of interest represented by the coupons due at the commencement of the month, in which the purchase was made by Clark, was a slight circumstance, and, taken in connection with the fact that previous coupons had been paid, was entirely insufficient to excite suspicion even of any illegality or irregularity in the issue of the bonds. Obligations of municipalities in the form of those in suit here are placed by numerous decisions of this court on the footing of negotiable paper. They are transferable by delivery, and when issued by competent authority pass into the hands of a *bona fide* purchaser for value before maturity, freed from any infirmity in their origin. Whatever fraud the officers authorized to issue them may have committed in disposing of them, or however entire may have been the failure of the consideration promised by parties receiving them, these circumstances will not affect the title of subsequent *bona fide* purchasers for value before maturity, or affect the liability of the municipalities. As with other negotiable paper, mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part. Such is the decision of the court, and substantially its language in the case of Murray v. Lardner, 2 Wall. where the leading authorities on the subject are considered.

The interest stipulated was a mere incident of the debt. The holder of the bond had his option to insist upon its payment when due or to allow it to run until the maturity of the bond, that is, until the principal was payable. Many causes may have existed for a failure to meet the interest as it matured, entirely independent of the question of the validity of the bonds in their inception. The payment of previous installments of interest would seem to suggest that only causes of a temporary nature had prevented their continued payment. If no installment had been paid, and several were past due, there might have been greater reason for hesitation on the part of the purchaser to take the paper, and suspicions might have been excited that something was wrong in issuing it. All that we now decide is, that the simple fact that an installment of interest is overdue and unpaid, disconnected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity for value as a *bona fide* purchaser. The National Bank of North America v. Kirby, 108 Mass., 497. To hold otherwise would throw discredit upon a large class of securities, issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every installment of interest on them as it matured, and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter. To hold that a failure to meet the interest as it matures renders them, though they may have years to run, and all subsequent coupons, dishonored paper, subject to all the defences good against the original holders, would greatly impair the cur-

rency and credit of such securities and correspondingly diminish their value. We are of opinion, therefore, that Clark took the two bonds in suit and the subsequently maturing coupons as a *bona fide* purchaser, and as such was entitled to recover upon them, whatever may have been their original infirmity. The plaintiff, Cromwell, succeeded by his purchase from Clark to all Clark's rights, and can enforce them to the same extent. Nor does it matter whether, in the previous action against the county by Smith who represented him, he was informed of the invalidity of the bonds as against the county, and knew, when he purchased, the circumstances attending their issue, or whether he was made acquainted with them in any other way. The rule has been too long settled to be questioned now, that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its owner can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition. This doctrine, as well as the one which protects the purchaser without notice, says Story, "is indispensable to the security and circulation of negotiable instruments, and it is founded on the most comprehensive and liberal principles of public policy." Story on Promissory Notes, Sec. 191. The only exceptions to this doctrine are those where the paper is absolutely void, as when issued by parties having no authority to contract, or its circulation is forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious transaction.

The plaintiff, therefore, holds the bonds and the subsequent coupons as his vendor held them, freed from all infirmities attending their original issue. Nor is he limited in his recovery upon them, or upon the other two bonds, as contended by counsel for the county, to the amount he paid his vendor. Clark had given full value for those he purchased, and could have recovered their amount from the county, and his right passed to his vendee. But independently of the fact of such full payment we are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law, but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market, one day being above par and the next day below it, and often passing within short periods from one-half of their nominal to their full value. Indeed all sales of such securities are made with reference to prices current in the market and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect impinges upon the doctrine that one who makes only a loan upon such paper or takes it as collateral security for a precedent debt may be limited in his recovery to the amount advanced or secured. Stoddard v. Kimball, 6 Cush., 471; Allaire v. Hartshorne, 1 Zab., 665; Williams v. Smith, 2 Hill, 301; Chicopee Bank v. Chapin, 8 Metc., 40; Lay v. Wiseman, 36 Iowa, 305.

The only questions remaining, which we deem of sufficient importance to require consideration, relate to the interest which the bonds and coupons in suit shall draw after their maturity, and the interest which the judgment shall bear. The statute of Iowa, on this subject, provides that the rate of interest shall be six per cent. a year on money due by express contract, unless a different rate be stipulated, and on judgments and decrees for the payment of money in such cases; but that parties may agree in writing for any rate of interest not exceeding ten per cent. a year, and that any judgment or decree thereon shall draw the rate of interest expressed in the contract.

The bonds by their terms, as already stated, bear interest at the rate of ten per cent. until maturity. The plaintiff claims that they should draw the same rate of interest after maturity, and that under the statute of Iowa the judgment should also bear ten per cent. interest. The court below allowed only seven per cent. on the bonds after maturity, that being the rate in New York, where the bonds were payable, and only six per cent. on the judgment. In this ruling we think the court erred. By the settled law of Iowa, as established by repeated decisions of her highest court, contracts drawing a specified rate of interest before maturity draw the same rate of interest afterwards. Hand v. Armstrong, 18 Iowa, 324, and Lucas v. Picket, 20 Ib. 490. A like decision has been made under similar statutes in several of the states; Brannan v. Hursell, 112 Mass. 63; Marietta Iron Works v. Lottimer, 25 Ohio St. 621; Monnet v. Sturges, Ib. 384; Kilgore v. Powers, 5 Blackf. 22; Phinney v. Baldwin, 16 Ill. 108; Etnyre v. McDaniel, 28 Ib. 201; Spencer v. Maxfield, 16 Wis. 185; Pruyn v. Milwaukee, 18 Ib. 367; Kohler v. Smith, 2 Cal. 597; McLane v. Abrams, 2 Nev. 199; Hopkins v. Crittenden, 10 Tex. 189; and such appears to be the English rule. Keene v. Keene, 3 C. B., N. S. 144; Morgan v. Jones, (Exchr.) 20 Eng. Law and Eq. 454; Pearce v. Henhessy, 10 R. I. 223; Lash v. Lambert, 15 Minn. 416; Searle v. Adams, 3 Kan. 515; Kitchen v. Branch Bank, 14 Ala. 233. There are conflicting decisions in some of the states, though the preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment. The statutory rate of six per cent. in Iowa only applies in the absence of a different stipulated rate. As the judgment in case of a stipulated interest in the contract must bear the same rate, it could not have been intended that a different rate should be allowed between the maturity of the contract and the entry of the judgment.

The case of Brewster v. Wakefield, 22 How. 118, in this court, is cited against this view. That case came from a territorial court, and arose under a statute which allowed parties to agree upon any rate of interest, however exorbitant, and only prescribed seven per cent. in the absence of such agreement. This court, bound by no adjudication of the territorial court, and looking with disfavor upon the devouring character of the interest stipulated in that case, gave a strict construction to the contract of the parties. "The law of Minnesota," (then a territory) said the court, "has fixed seven per cent. per annum as a reasonable and fair compensation for the use of money; and when a party desires to extort, from the necessities of a borrower, more than three times as much as the legislature decrees reasonable and just, he must take care that the contract is so written in plain and unambiguous terms, for with such a claim he must stand on his bond." The statute of Iowa only allows the parties by their agreement to stipulate for interest up to ten per cent. a year—a rate which has not been deemed extravagant or unreasonable in any of the states lying west of the Mississippi. Be that as it may, the question is one of local law under a statute of a state, and the construction given by its tribunals should conclude us.

The position of counsel, that because the rate of interest in New York, where the bonds were payable, is only seven per cent., the bonds can only draw that rate after maturity, is not tenable. When the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern. Miller v. Tiffany, 1 Wall. 298; Depeau v. Humphreys, 20 Mart. (La.) 1; Chapman v. Robertson, 6 Paige, 627, 634; Peck v. Mayo, 14 Vt. 33; Butters v. Old, 11 Ia. 1. The bonds were made with reference to the law of Iowa, as to interest, and not to that of New York, where interest above seven per cent. is deemed usurious and avoids the whole contract. The obligor is a municipal corporation of Iowa, the bonds were deliverable in that state, and proceedings to enforce their payment could only be had in courts sitting there.

With reference to interest on the coupons after their maturity, that can be allowed only at the rate of six per cent. under the law of Iowa. See as to coupons drawing interest, Aurora City v. West, 7 Wall. 105.

It follows, from the views expressed, that the plaintiff was entitled to judgment for the amount of the four bonds and the coupons in suit, with interest on the bonds after maturity until judgment, at the rate of ten per cent. a year, and with interest on the coupons after their maturity until judgment, at the rate of six per cent. a year; and that the judgment should draw interest at the rate of ten per cent. a year upon the amount found due on the bonds, and at the rate of six per cent. a year upon the amount found due on the coupons, including the costs of the action.

The judgment of the circuit court must, therefore, be reversed, and the cause remanded with directions to enter a judgment for the plaintiff, in conformity with this opinion; and it is so ordered.

NOTE.—Upon the question as to whether the purchaser for value of unmatured negotiable paper, with overdue interest thereon, takes it as dishonored, and subject to all infirmities in its origin, there are but few reported cases in the state courts, and those few are of recent date and conflicting. Neither do the English decisions throw any light upon the point.

In Boss v. Hewitt, 15 Wis. 260, decided in 1862, and the earliest case in point, the defendant executed four negotiable notes, payable respectively in one, two, three and four years, with interest payable annually, for the price of sheep bought of the payees, and secured all the notes by a mortgage. One of the notes, and an installment of interest on all of them, being due and unpaid, the payees transferred the notes and mortgage to the plaintiff, who brought suit to foreclose. Defendant pleaded fraud on the part of the payees in the sale of the sheep. The court held, *first:* that the fact that the *first* note was due and unpaid at the time of the transfer to the plaintiff did not let in the defense as against the notes not then due, without deciding how it might have been if the plaintiff had bought with actual notice that all the notes were given for the same consideration; *secondly*, that the notes not matured were not to be treated as dishonored, and subject to all equities in the plaintiff's hands, by reason of an installment of interest being due and unpaid thereon at the time of the purchase. On the latter point the court say: "Neither do we think that the fact that the interest had not been paid makes the case equivalent to a purchase after maturity, so as to let in defenses that might have been made against the original parties. The interest is a mere incident to the debt, and although it is frequently provided that it shall be paid at stated intervals before the principal falls due, we know of no authorities holding that a failure to pay it dishonors the note so as to let in all defenses against subsequent purchasers for value, without any other notice of defects, except the mere fact that such interest had not been paid; and we do not think that it should have that effect. *The maturity of the note, within the meaning of the commercial rule upon this subject, is the time when the principal becomes due.*" In Hart v. Stickney, 41 Wis. 630, the court held directly opposite to the decision in Boss v. Hewitt, and without any reference to that case, either in the opinion or the arguments of counsel, which are quite fully reported; but it is understood that the earlier case was in fact overlooked in deciding the later, and that the court now regards the question as an open one.

In National Bank of North America v. Kirby, 108 Mass., 497, it was held that where a note payable four years after date, with interest annually, was transferred after three installments of interest had become due, and these were not indorsed as paid, and were in fact unpaid at the time of the transfer, these facts did not subject the note in the hands of the indorsee to defences good against the payee; and though the court limit their decision to the case where the indorsee has no notice of the non-payment of the interest other than the absence of any indorsement of payment, their reasoning is strong to show that notice of non-payment would not alter the case. It is is said in the opinion (p. 501): "It has indeed been held by this court that a note, the principal of which is payable by installments, is overdue when the first installment is overdue and unpaid, and is thereby subject to all equities between the original parties. Vinton v. King, 4 Allen, 562. Such a note is a single contract, and the party to whom it is transferred must take it with notice that as to the overdue installment the maker may have a justifiable cause for withholding payment, which may affect the whole contract. But in its effect upon the

credit of a note, it is manifest that a failure to pay interest is not to be ranked with a failure to pay principal. Interest is an incident of the debt, and differs from it in many respects. It is not subject to protest and notice to indorsers, or days of grace, according to the law merchant. Interest is not recovered on overdue interest, and the statute of limitations does not run against it until the principal is due. The holder of a note with interest payable annually loses no rights against the parties to it, whether makers or indorsers, by neglecting to demand it; and he has the election to do so, or wait and collect it all with the principal. In Brooks v. Mitchell, 9 Mees & Wels., 15, it was held that a promissory note payable on demand cannot be treated as over due so as to affect an indorser with equities, merely because it is endorsed a number of years after its date, and no interest has been paid on it for several years before such transfer; and the same was held in Boss v. Hewitt, 15 Wis., 260. We are referred to no case in which it has been held that failure to pay interest, standing alone, is to be regarded sufficient in law to throw such discredit upon the principal security, upon which it is due as to subject the holder to the full extent of the security to antecedent equities. There is a large class of negotiable securities, the principal of which is payable only at the end of many years, but with interest payable either annually or semi-annually; and many of the notes given in the purchase of real estate and secured by mortgage, especially in the country, are of this class, *as are most of the obligations for debt, contracted by public, and many of those incurred by private corporations; and it is important that the value due to their negotiable character should not be impaired by new rules, tending to lessen their currency and credit.*"

The cases opposed to this position, besides that in 41 Wis,, already noticed, are Newell y. Gregg, 51 Barb., 263 and 1st Nat. Bank of St. Paul v. Commrs. of Scott county, 14 Minn., 77. Newell v. Gregg is a singular case, and the decision seems open to much criticism on other points than that now in question. The plaintiff having made his negotiable note for $200, payable two years after date, with interest payable annually, sued the executor of the payee for having fraudulently transferred it to a *bona fide* purchaser for value, knowing that the plaintiff had paid before maturity to the payee in his lifetime; by reason of which transfer the plaintiff had been compelled to pay it again to the indorsee. The court held that an action would lie for such a cause. But they further held that the plaintiff could not recover, because at the time of the transfer of the note by the defendant, the first installment of interest appeared to have been due and unpaid, and hence (as they held) the purchaser took the note dishonored, and the maker could, and should have set up its prior payment against him, instead of yielding to his demand. It does not appear that the plaintiff, when he paid the note to the indorsee, had any notice of the fact that the transfer was after the interest fell due; and the referee who tried the case had found that the plaintiff had been *compelled* to pay; not that he paid voluntarily. But aside from this it seems clear that the defendant, who had by a gross fraud transferred the note for full value, as a valid and subsisting obligation, knowing that it had been paid, was not entitled, when called on to disgorge what he had thus unrighteously obtained, to set up the defense of which the court gave him the benefit. The maker of the note surely was not bound, as between him and the defendant, to deny the purchaser's title to demand payment of the note, which the defendant had sold to him as an existing note for full value. If he had done so successfully, the result would have been to visit the evil consequences of the defendant's fraud upon the innocent purchaser, leaving the wrong-doer to retain and enjoy the fruits of his iniquity. He ought, it would seem, to have been held estopped to say that the indorsee did not acquire good title to the note.

In First National Bank of St. Paul v. Comrs. of Scott county, 14 Minn., 77, the county had issued negotiable coupon bonds, payable five years after date, with interest annually. Some of the bonds, which had been lost by the owner or stolen from him, were afterwards purchased by the plaintiff about eight months before their maturity, and with *all* the coupons attached thereto. It was held that the plaintiff acquired no title, and could not recover on the bonds. Where the *principal* of a note is payable in installments at different times, the non-payment of an installment when due will dishonor the entire note in the hands of a subsequent purchaser. Vinton v. King, 4 Allen, 562; Field v. Tebbetts, 57 Me. 359.

The decisions are also in conflict as to the right of a purchaser of a negotiable security before maturity for less than its face, to recover the full amount of the security against the maker, when the maker has a good defense against the original holder.

In Dresser v. Missouri, etc. R. R. Const. Co., 93 U. S. 92, the plaintiff had purchased the notes of the defendant for $10,000 from the payee, but had only made a partial payment of $500 upon the agreed price, when he received notice that the payee had obtained the notes by fraud. It was *held* that he could recover from the maker only the $500. But the court carefully distinguished the case from a purchase at a discount, with full payment of the agreed price. It is said in the opinion (p. 93): "The argument of the plaintiff in error is that negotiable paper may be sold for such sum as the parties may agree upon, and that whether such sum is large or small, the title to the entire paper passes to the purchaser. This is true; and if the plaintiff had bought the notes in suit for $500, before maturity and without notice of any defense, and paid that sum or given his negotiable note therefor, the authorities cited show that the whole interest in the notes would have passed to him, and he could have recovered the full amount due upon them." In Lacy v. Wissman, 36 Iowa, 305, (308), it was expressly decided that a purchaser of a promissory note before maturity, without notice, for a less amount than its face, could recover against the maker the full amount of the note, whatever may have been its original infirmity. It also points out the distinction between the case of an absolute purchase of the paper for a consideration which is fully paid, and the numerous cases where it has been transferred by the payee as collateral security for a debt of less amount, (in which case the indorsee holds in trust for the payee, as to the overplus), or where, as in Dresser v. Missouri R. R. Const. Co., (cited above), the agreed price has not been fully paid. In Nat. Bank of Mich. v. Green, 33 Ia. 140, the indorsee who purchased at a discount was in like manner held entitled to recover the full amount of the note from the *indorser*.

On the other hand, it was held that the *bona fide* purchaser could recover from the maker only the amount paid for the note, with interest, when the note had a fraudulent inception, in the following cases: Holcomb v. Wyckoff, 35 N. J. Law 35; Huff. v. Wagner, 63 Barb. 229; Harger v. Wilson, ib. 237; and Todd v. Shelbourne, 8 Hun (N. Y. Sup. Ct.) 510. But the doctrine of these latter cases does not appear to have ever been sanctioned by the New York Court of Appeals. See Park Bank v. Watson, 42 N. Y. 490.

There are, however, two classes of cases in which it is well settled that the purchaser can recover only the amount of consideration for the transfer, with interest. One of these classes is where the plaintiff either took the note sued on as collateral security for a debt or loan of less amount from a party who held it subject to defenses, and to whom the plaintiff was bound to account for the amount collected over and

above his debt. Allaire v. Hortshorne, 1 Zab. 665; Stoddard v. Kimball, 6 Cush. 469; Chicopee Bank v. Chapin, 8 Met. 40; Williams v. Smith, 2 Hill. 301. The other class is where the purchaser had only partially paid the agreed consideration for the transfer, or had notice of the makers' defense, before full payment of such consideration. Dresser v. Missouri R. R. Const. Co., 93 U. S. 92; Platt v. Beebe, 57 N. Y. 339; Hubbard v. Chapin, 2 Allen 328; Youngs v. Lee, 12 N. Y. 551; Jones v. Hibbert, 2 Starkie 304; Cardwell v. Hicks, 37 Barb. 458.

Upon the question as to the rates of interest upon the bonds and coupons after maturity, and upon the judgment thereon, in the principal case, Mr. Justice Field has, in his opinion, cited the authorities fully. It may be added that when no provision is made as to interest by the terms of the note or other contract sued upon, it has been held that the rate of interest to be allowed as damages for non-payment at maturity, is to be determined by the *lex fori*, and not by the law of the place of contract or of payment. Ayer v. Tilden, 15 Gray 178; Ives v. Farmers' Bank, 2 Allen 236; Goddard v. Foster, 17 Wall. 123, 143. H. M. H.

DIGEST OF DECISIONS OF SUPREME COURT OF THE UNITED STATES.

STATUTE OF FRAUDS—AGREEMENT NOT SIGNED BY PARTY TO BE CHARGED—EVIDENCE OF ADMISSIONS OF DEFENDANT—SEPARATE ACTIONS.—This was an action brought by Talbot against G. C. Beckwith for breach of the following agreement: "This is to certify that the undersigned have taken two thousand two hundred and five head of cattle, valued at thirty-six thousand six hundred and eighty-one dollars and sixty cents, on shares, from George C. Beckwith; time to expire on the fifth day of December, one thousand eight hundred and seventy-two; then Geo. C. Beckwith to sell the cattle and retain the amount the cattle are valued at above. Of the amount the cattle sell at, over and above the said valuation, George C. Beckwith to retain one-half, and the other half to be equally divided between C. W. Talbot, and Elton T. Beckwith, and Edwin F. Beckwith." This agreement was signed by Talbot and the two young Beckwith's, but was not signed by defendant. It was delivered to him, however, and kept by him, and in several letters written by defendant to plaintiff he referred to "the agreement," declared his intention to adhere to it and to hold plaintiff to it. *Held*, that the letters were a recognition of the agreement and bound defendant under it, and that parol evidence was admissible to show that the agreement mentioned in the letters was the one sued on. Johnson v. Dodgson, 2 M. & W. 653; Salmon Falls Co. v. Goddard, 14 How. 456. *Held, further*, that the defence that the plaintiff was interested jointly with the defendant's two sons, and therefore could not maintain a separate action for his equal share of the profits, is not tenable. Their interests were separate. They were all employed and hired by the defendant to herd his cattle. The evidence shows that each supported himself, found his own assistants, and paid his own expenses. Each was to have as his compensation one-third of half the increased value of the cattle at the end of the employment. Neither was interested in the compensation due to the other. Sergeant Williams, in his note to Eccleston v. Clipsham, 1 Saunders' Rep., 154, says: "Though a man covenant with two or more jointly, yet if the interest and cause of action of the covenants be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint." In the present case the cause of action was the service performed under the contract, and each performed his own distinct service and was entitled to distinct and separate compensation therefor. The case is precisely within the category stated by the learned annotator. It is very similar also to that of Servante and others v. James, 10 Barn. & Cres. 410, where the master of a vessel covenanted with the several part-owners to pay to them severally in certain proportions the moneys which he should receive from the government for carrying the mails; and it was held that the covenant enured to them severally and not jointly, because their interests were several. The case is also quite similar to that of an engagement with seamen for a whaling voyage, where each is to receive for his compensation a certain percentage of the profits of the voyage. Though they work together and in co-operation, they do not become partners, nor does either acquire any interest in the compensation of the others. The interest of each is separate.—*Beckwith v. Talbot*. In error to the Supreme Court of Colorado. Opinion by Mr. Justice BRADLEY. Judgment affirmed.

CONTRACT — VERBAL AGREEMENT — ALTERING WRITTEN CONTRACT—EXPRESS STIPULATIONS AND IMPLIED PROMISES.—1. Plaintiff contracted to furnish material for a building erected under an act of Congress, the contract providing that no departure from its conditions should be made without "the written consent of the Secretary of the Treasury." Plaintiff furnished, under a subsequent oral agreement with the assistant superintendent having charge of the erection of the building, material better than that called for by the original contract. *Held*, that the assistant superintendent had no authority to enlarge the terms of the original contract, and plaintiff could not claim compensation for the value of the material furnished, but only the contract price for the material he was required by the contract to furnish. 2. Verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to vary its terms or to affect its construction, the rule being that all such verbal agreements are to be considered as merged in the written instrument. But oral agreements subsequently made on a new and valuable consideration, and before the breach of the contract, in cases not falling within the statute of frauds, stand upon a different footing, as such agreements may, if not within the statute of frauds, have the effect to enlarge the time of performance, or may vary any other of its terms, or may waive and discharge it altogether. Emerson v. Staler, 22 How. 41; Goss v. Nugent, 5 Barn. & Ad. 65; Nelson v. Boynton, 3 Met. 402; Harvey v. Grabbam, 5 Ad. & Ell. 61; Leonard v. Vredenburg, 8 Johns. 39; Chitty on Con., 10th ed., 105. 3. Express stipulations cannot in general be set aside or varied by implied promises, or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned, or has been varied by the consent of the parties. Hence the rule is that if there be an express written contract between the parties, the plaintiff in an action to recover for work and labor done, or for money paid, must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he cannot recover under such circumstances upon a *quantum meruit*. 1 Story on Cont., 5th ed., sec. 18; Selway v. Foy, 5 Mees. & Wels. 83; Creighton v. Toledo, 18 Ohio St. 451; Weston v. Davis, 24 Me. 375; Whiting v. Sullivan, 7 Mass. 109; Merrill v. Railroad, 16 Wend. 588; Glacius v. Black, 50 N. Y. 150. When a special contract for work and services has been abandoned and put an end to, if the employer has derived some benefit from work done under it he may be made liable upon an implied promise to make reasonable remuneration in respect to such work. Bain v. Miller, 4 Taunt. 743; Inchabald v. Railway, 17 C. B., N. S. 733; Bartholomew v. Mark-

wick, 15 C. B., N. S. 711; Addison on Cont., 6th ed., 23. Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum.* Hence, says Chitty, a party cannot be bound by an implied promise when he has made an express contract as to the same subject-matter; which is certainly sound law unless the express contract has been rescinded or abandoned. Chitty on Cont., 10th ed., 62; Touissiant v. Martinnant, 2 Term, 105; Culler v. Powell, 6 Id. 324; Fergueson v. Carrington, 9 B. & C. 59; Dennett v. Atherton, Law Rep., 7 Q. B. 327. Apply these principles to the case before the court, and it is clear that none of the errors assigned can be sustained, the rule being that where the service is performed under an express contract there can be no recovery where there is no proof of a breach of the agreement. Where there is a breach of the agreement an action will lie for the breach, but if there be no breach no action will lie, as an implied assumpsit does not arise in such a case, unless it be shown that the parties have abandoned the express agreement, or have rescinded or modified it so as to give rise to such an implication. Mayor v. Eschbach, 17 Md. 283.—*Hawkins v. United States.* Appeal from the Court of Claims. Opinion by Mr. Justice CLIFFORD. Decree affirmed.

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

November Term, 1877.

[Filed February 19 and 26, 1878.]

HON. EDWARD A. LEWIS, Presiding Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

MISSOURI CORPORATION LAW—CONSTRUCTION OF CHARTER—"SHALL HAVE PERPETUAL SUCCESSION."—A charter was granted under a general corporation law which provides that every corporation shall have succession for twenty years when no period is limited in its charter. In the charter of the Masonic Hall association it was provided that the incorporators and their successors "shall have perpetual succession." *Held*, that the word "perpetual" as thus used signifies unbroken continuity and is not meant of duration. No period is limited in the charter and the corporation ceased to exist at the end of twenty years. 2. An order of execution against a stockholder under sec. 13, p. 291, Wagner's Statutes, is a nullity if the corporation was no longer in existence when the judgment against it was rendered. Reversed and dismissed. Opinion by LEWIS, P. J.—*Scanlan v. Crawshaw.*

CO-LESSORS—ASSIGNMENT BY ONE—PRIVITY.—As in the case of a joint-tenant, though in respect of his companion each is seized of the whole, yet for the purpose of alienation he is seized only of his undivided half, so, in case of co-lessors, when one of them assigns, his assignee is in privity of estate with the original lessor and landlord for an undivided half of the leasehold only; and as his liability to the landlord for rent reserved under the lease is not by virtue of possession nor by privity of contract, but by privity of estate only, the assignee of one of two co-lessees, though in actual possession of all the premises, is liable to the landlord for one half only of the rent reserved by the lease. Rehearing denied. Opinion by BAKEWELL, J.—*Board of Public Schools v. Boatmen's Ins. & Trust Co.*

CONTRACT BETWEEN RAILROAD AND FERRY COMPANY—CONSTRUCTION—MEANING OF TERMS "TO AND FROM THE ILLINOIS SHORE," "OPPOSITE ST. LOUIS"—FRANCHISES OF CORPORATION—PUBLIC POLICY—JUDICIAL NOTICE,—1. Respondent, a ferry company with a landing at East St. Louis, and appellant, a railroad between East St. Louis and Chicago, being common carriers, agreed that respondent would furnish the necessary wharf-boats and steam ferry boats for the transit across the Mississippi at St. Louis of passengers and freight coming from, or going to appellant's railroad, at reasonable rates, and that appellant would always employ the respondent's ferry to transport across the river all persons and property taken across the river, either to or from the Illinois shore, either for the purpose of being transported on appellant's road, or having been brought to the river upon said road, so that respondent should have the profits of ferriage and no other ferry than respondent ever be employed by appellant to cross any passengers or freight coming and going on said road. Afterwards, a cattle trade sprang up and stock yards were built at Venice, a point on the Mississippi river opposite St. Louis, three miles north of respondent's landing, and the Madison Ferry company at that point made a contract with appellant providing for a car transfer over the ferry and a station of defendant's road at Venice, and for doing ferriage for appellant at that point at reasonable rates. There was no evidence that appellant took steps to introduce the car-transfer system or the transfer at the Venice ferry. The station on appellant's road and the car transfer at Venice were results of growing trade and of public demands. Appellant could not have obtained access to the river at East St. Louis so uninterrupted and convenient as at Venice. Respondent sued appellant for breach of contract, and recovered as damages the ferriage of car freights at Venice. *Held* that this was error. The appellant upon the evidence adduced, was not liable for ferriage of any of the car freights. No such freights were expressly named in the contract, and such freights and methods of transfer were not contemplated by the contracting companies. Such freights were meant only as should come and go in the regular course of business, unimpeded by adverse efforts of the railroad company. It was not contemplated that the railroad would compel trade into the channel of the Wiggins ferry company. 2. "To and from the Illinois shore" in the contract, does not mean all parts of the Illinois shore opposite St. Louis. The railroad company could not bind itself not to exercise its franchise for the purpose of transferring passengers and freight at another point opposite St. Louis when the public interest so demanded; and respondent had no franchise to ferry at all points opposite the city. A reasonable meaning must be given to the phrase "opposite St. Louis." 3. The franchises of corporations that are common carriers are held in trust for the public, and the interests of their stockholders are subordinate to those of the public. 4. Courts will not enforce contracts which tend to prevent a railroad company from employing those facilities which are adapted to its business and to the needs of transportation. A provision in a contract between common carriers which implies that, if improvements are made or new facilities for transportation brought into play, the shipper shall be denied the advantage, are void as in restraint of trade. When a car transfer was established at Venice, appellant could not deny its use to shippers and compel them to unload and use respondent's ferry. A common carrier corporation cannot so use its franchises as to compel shippers to trade under unnecessary impediments. 5. It was the duty of respondent to furnish car transfer without any demand from appellant; and appellant was not bound to continue its track to the river, until respondent had established a car transfer ferry to connect with. Respondent not being able to do the business of car transfer, the appellant was bound to use the ferry that could and would do it. 6. Agreements that prevent competition are against public policy and void; and this is especially true of the carrying trade. Where the law refuses to sanction a contract its violation can create no

cause of action and appellant cannot be compelled to pay damages for non-performance. 7. Courts take notice of the course of business in the country and of new processes facilitating trade. Reversed and remanded. Opinion by HAYDEN, J.—*Wiggins Ferry Co. v. Chicago & Alton R. R.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1877.

HON. HORACE P. BIDDLE, Chief Justice.
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS,
} Associate Justices.

COMMON CARRIERS—IMPLIED OBLIGATIONS. -The implied obligations of a common carrier, arising from his relation to the public, is limited by the termini of his own route. Merely connecting with other lines which he does not control will not make him a common carrier over such connecting lines. In this state the matter is regulated by statute, and the statute nowhere lays upon railroad companies the duty of taking employment at current prices beyond the termini of their respective routes. Opinion by BIDDLE, C. J.—*P. C. & St. L. R. R. Co. v. Morton, et al.*

EXECUTION—CONTRADICTING SHERIFF'S RETURN. —Under section 517 of the Code, the sheriff's return on an execution "shall be taken and deemed to be a record." A record imports absolute verity and cannot be contradicted by parol evidence. A party to an execution, or one claiming under him, cannot contradict the sheriff's return of such execution, or any of the official acts of the sheriff recited in such return, except in a direct proceeding against such sheriff for making a false return. 48 Ind., 397. Opinion by HOWK, J.—*Stockton, et al. v. Stockton.*

SCHOOL-FUND MORTGAGE SALES—RECORD NECESSARY TO VALIDITY.—Under the statute which provides that in sales of lands mortgaged to the school-fund, etc., "the county treasurer shall also attend and make a statement of such sales, which shall be signed by the auditor and treasurer, and after being recorded in the auditor's office, shall be filed in the treasurer's office, etc.," the making of such a statement by the auditor and treasurer is necessary to the validity of such sale. A strict compliance with all the substantial provisions of the law is necessary in making such sales under school-fund and other similar mortgages, in order to divest the title of the mortgagor. 16 Ind., 116; 21 Ind., 421; 29 Ind., 1. Compliance with the provision of the statute that the deeds shall be executed by the county auditor and entered in the record of the board of county commissioners before delivery, is also a necessary step in the progress of the sale. The entry on the commissioners' record is a condition precedent to the delivery of the auditor's deed. Opinion by NIBLACK, J.—*Arnold, et al. v. Gaff, et al.*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877—*Filed January* 30, 1878.

HON. LUTHER DAY, Chief Justice.
" JOSIAH SCOTT,
" D. T. WRIGHT,
" W. W. JOHNSON,
" T. Q. ASHBURN,
} Associate Justices.

EVIDENCE—COLLATERAL FACTS.—1. Evidence must be confined to the issue, and even for the purpose of corroborating the testimony of witnesses, an inquiry into facts entirely collateral, leading to a controversy over matters altogether foreign to the case before the court, can not be permitted. 2. The effect of incompetent testimony once admitted, can not be done away with, except by such a charge to the jury as will force them to disregard it completely. Judgment affirmed. Opinion by WRIGHT, J.—*Commrs. of Hancock Co. v. Brand.*

TRANSFER OF LIEN—VENDOR'S LIEN—RIGHTS OF WIFE — SALE — SURPLUS.—1. The mere loaning of money to a judgment debtor, to be applied by him in part satisfaction of a judgment which is a lien upon the debtor's land, does not operate to transfer such lien, in whole or in part to the lender, even though it was understood between the parties to the transaction that it should have that effect. 2. Where, in a suit brought to enforce a vendor's lien for purchase money, to which the vendee and his wife, and also the holder of a subsequent mortgage executed by the vendee alone, are made defendants, and the proceeds of sale of the land covered by the liens are more than sufficient to discharge the vendor's claim, the wife is entitled, as against such mortgagee, to assert her contingent right of dower in the surplus fund. 3. But such a right of the wife must be protected in a mode which will not interfere with the right of the mortgagee to subject the whole estate of the husband in the premises to the present satisfaction of the mortgage debt, in its order of priority. 4. Therefore, when such surplus is insufficient to discharge fully the mortgage debt, the court should not (against the will of the mortgagee) direct one-third of the surplus fund to be put on interest by the sheriff, during the life of the wife, for the purpose of securing her contingent dower interest. 5. The proper course, in such cases, is to award to the wife from the surplus fund, the value of her contingent right of dower therein, to be ascertained by reference to the tables of recognized authority on that subject, in connection with the state of health and constitutional vigor of the wife and her husband. Order of distribution set aside, and remanded to the court below for proper modification. Opinion by SCOTT, J. Wright and Johnson, J. J., dissented to all but the first proposition.—*Unger v. Leiter.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT,
" OTIS P. LORD,
" AUGUSTUS L. SOULE,
} Associate Justices.

CONTRACT—AGENCY—EVIDENCE.—F and D made a contract, by which it was agreed that F should make bricks, and D was to furnish all the necessary materials except the clay. The manner in which F was to be paid for his work was specified, and it was provided that the bricks when finished were to be the property of D. F bought wood from the plaintiff, which was consumed in burning the bricks, with the knowledge of D. *Held*, that F had no duty to obtain the wood, and whether he acted as agent of D was a question for the auditor to determine on the facts before him, and the report of the auditor, stating the substance of those facts, was proper evidence upon that question. Opinion by ENDICOTT, J.—*Emerson v. Patch.*

STATUTORY PLEADING — GENERAL DENIAL— ANSWER.—1. The allegation in the defendant's answer that "if the plaintiff shall prove," etc., is not a direct and positive allegation required by the rules of plead-

ing, and sets up no defense. Suit v. Woodhall, 116 Mass. 547; Jackman v. Doland, 116 Mass. 550. 2. But this is not material in this case, because it was competent for the defendant, having also filed a general denial, to introduce the same defense thereunder. 3. Under the system of pleading established by the statutes re-enacted in Gen. Stats., Ch. 129, the answer must deny in clear and precise terms every substantial fact intended to be denied, and must set forth in clear specifications every substantial fact intended to be relied on in avoidance of the action. §§ 17, 20. But it has been held that a general denial puts in issue all the facts necessary to be proved by the plaintiff to make out a *prima facie* case. Davis v. Travis, 98 Mass. 222. Opinion by MORTON, J.,—*Caverly v. McOwen.*

CONSTITUTIONAL LAW—TAX ON CORPORATE FRANCHISE.—The constitution of the Commonwealth provides that the legislature may impose and levy reasonable duties, and excises upon any goods, wares, merchandises and commodities whatever, brought into, produced, manufactured or being within this state. Commodity is a general term, and includes the privilege and convenience of transacting a particular business; and upon persons carrying on such business it has never been questioned that the legislature may levy an excise or provide that a license must be obtained to transact it. Gen. Sts., sec. 50. Upon the franchise conferred by the legislature upon a corporation, or exercised by a corporation of another state, an excise may be laid. Portland Bank v. Apthorp, 12 Mass. 252; Atty.-General v. Bay State Min. Co., 99 Mass. 148. It is not a tax upon property. And such tax can only be imposed upon corporations in the exercise of corporate powers, and not where they are in the hands of receivers. Columbian Book Co. v. De-Golger, 115 Mass. 67, 69. Opinion by ENDICOTT, J.—*Com. v. Lancaster Sav. Bank.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF NORTH CAROLINA.

January Term, 1878.

HON. W. H. N. SMITH, Chief Justice.
" EDWIN G. READE, } Associate Justices.
" W. B. RODMAN, }
" W. P. BYNUM, }
" W. T. FAIRCLOTH, }

CRIMINAL LAW—MIS-TRIAL—AUTRE FOIS ACQUIT—RES INTER ALIOS ACTA.—1. Where a prisoner was put on trial, jury impanneled and charged with his case, and at the suggestion of the prosecuting officer that the indictment was defective, a juror was withdrawn and a mis-trial had: *Held*, if the first indictment was so defective that (as here) no judgment could have been pronounced upon the prisoner if convicted, it was proper to put him on trial upon another and sufficient indictment for the same offense. 2. It is not competent to prove that certain footprints did not correspond with the tracks of the prisoner's brother, the prisoner not having alleged that his brother committed the offence with which he stood charged. Evidence tending to show the innocence of A is not admissible as tending to show the guilt of B. It is *res inter alios acta*. Opinion by BYNUM, J.—*State v. England.*

CRIMINAL LAW—MURDER BY POISON—EXPERT EVIDENCE.—In an indictment for murder by poisoning, a physician, examined as an expert, was allowed to testify that, from the symptoms and manner of death, as deposed by witnesses, and from the post mortem examination, as deposed by a medical man, he believed the death was caused by strychnine. *Held*, error. It is obviously improper for any one, expert or not, to express an opinion warranted only by assuming the truthfulness and accuracy of what witnesses have testified. Such evidence is competent only when founded on facts within the personal knowledge and observation of the expert, or upon hypotheses of the findings of the jury. It is not the province of an expert to draw inferences of fact from the evidence, but simply to declare his opinion upon a known or hypothetical state of facts.—*State v. Bowman.*

DIVERTING FLOW OF WATER—INDIVIDUAL LIABILITY OF OFFICERS OF CORPORATION.—This is an action by the owner of a mill, on an outlet from a certain swamp, to recover damages against the Canal Company and certain of its officers, individually, for diverting a considerable part of the water which was accustomed to flow by the mill, by cutting a canal above the mill. *Held*, any proprietor, through whose land water flows, has a right to a reasonable use of the water for a mill or any other purpose, provided he does not materially damage the proprietor above or below him. Such right could not be impaired by any notice by the company that they intended to drain the swamp. The court will permit no errors to be assigned here which were not assigned in the court below, except that the court, in which trial was, had no jurisdiction and that the complaint does not contain a sufficient cause of action. The officers of the company are liable individually, if they did not pursue the course marked out by the act of incorporation, no statutory remedy being given plaintiff in a case of this kind, his remedy at common law still exists. *Williamson v. Flat Swamp Canal Co.*

ACTION AGAINST SHERIFF FOR NEGLIGENCE—ALTERATION OF PROCESS.—A summons and requisition for personal property, in an action for claim and delivery, was issued by the clerk of the Superior Court of Davie county to the sheriff of Davidson; subsequently the property being supposed to be in Forsythe county, the process was delivered up by the deputy sheriff of Davidson, in whose hands it had been placed, to the clerk of Davie Superior Court, who altered it by striking out the word "Davidson" wherever it occurred, and inserting "Forsythe." The process was then sent to the sheriff of Forsythe. An action is now brought against the sheriff of Davidson by the plaintiff for negligence, and a motion is made to strike out "Forsythe," so the process might read as at first. *Held*, the alteration, if made by an unauthorized party, could be stricken out, but the clerk had authority to alter process. Process can be amended, but not where third parties have acquired rights which may be affected by the amendment. One effect of the amendment would be to shift the burden of proof from the plaintiff to the sheriff of Davidson. The sheriff of Forsythe had also a right to have the process remain unaltered. The court declines to express, at this stage, any opinion whether the plaintiff can prove facts tending to fix the sheriff of Davidson with liability as the process stands, or as to right of defendant to use rebutting testimony. Opinion by RODMAN, J.—*Phillips v. Holland.*

CORRESPONDENCE.

THE TEXAS CATTLE CASE.

To the Editor of the Central Law Journal:

In a note to Railroad Company v. Husen, *ante*, 172, "G. G. V." says he presumes that the fact was not brought before the court that all Texas, Mexican and Indian cattle brought into Missouri between the first days of March and December, bring with them a deadly disease, which is almost invariably fatal to domestic cattle exposed to association or vicinity with those imported. "G. G. V." is quite right. No such fact was brought to the attention of the court, and the decision was reached, most unquestionably, in the most profound ignorance of the existence of any such all-im-

portant fact. It was, however, shown to the court that all such cattle which have not undergone the necessary period of quarantine—if the word may be so used—away from their native range, are liable to communicate disease during the prohibited months, to domestic cattle. But it was necessarily admitted on the argument that Texas cattle which had passed the entire previous winter in Iowa or Nebraska would not import disease. If this decision is open to no more valid objections than those urged by "G. G. V.," it is, in my opinion, more than ordinarily sound. M. A. Low.

MANSLAUGHTER AND MURDER.

To the Editor of the Central Law Journal:

I do not propose to review the article published in No. 10, current volume of your Journal, over the signature "H. S. K." but desire the attention of your readers to a single point, perhaps the least defensible of the many points ingeniously made by the author.

It is gratifying that "H. S. K." selected your Journal as the medium of his address to the bench and bar, for, if we are to enter upon this new departure of the trial judges entering the lists in defense of their rulings as against the more mature deliberations of our Supreme Court, it should be done through the medium of our law publications, and not of the political press.

"H. S. K." quotes at length from the opinion in the case of State v. Alexander, delivered by Henry, J.—not yet published—that part of the opinion relative to the instructions in respect to manslaughter in the second degree, in which the Supreme Court employs the following language: "In his written opinion on application of the defendant to be admitted to bail, the judge who tried this cause, correctly stated the law as follows: 'A man is taken to intend that which he does, or which is the necessary or immediate consequence of his act. To illustrate, if a man, within shooting distance of another, raises his gun, takes aim and fires, and the ball inflicts a mortal wound, from which death ensues, the fair presumption is that he intended to kill his victim, and, if so, the act is certainly murder, unless done in self defense.' The case supposed by him to illustrate the principle is the very case here, and it is a little remarkable that the court, having so clear a view of the law, should have given the 16th instruction. That defendant intended to kill Norrick is beyond a doubt." After quoting from the opinion in State v. Phillips, 24 Mo. 475, the Supreme Court continues: "Those remarks are equally applicable to this case, and it was an error to give the 16th instruction."

"H. S. K.," in reply to the opinion of the court in the Alexander case, among other things, says: "In Landers v. State, 12 Texas, 462, the evidence proved a deliberate killing by lying in wait, and the defense was justification on account of previous threats, and fear that they would be executed at some future time. The defendant was found guilty of murder in the second degree, by reason of erroneous instructions, defining a case of murder in the first degree to be murder in the second degree; and the defendant sought a reversal on that ground. The Supreme Court of Texas said there was no doubt of the error, but it operated in favor of the defendant, and not against him; and upon no principle could it be maintained that for such an error the court would be warranted in reversing the judgment. But the Supreme Court of Missouri, to be consistent, would have to reverse such a case."

If the error in giving the 16th instruction in the Alexander case was the only error in the case, then "H. S. K's" reasoning would be conclusive. But such was not the fact, for the case contained errors enough to reverse several first-class murder cases, all of which are clearly shown in the opinion. Does "H. S. K." contend that in a case where all the evidence tends to establish a case of murder, that it is within the discretion of the trial court to instruct the jury in respect to the law of manslaughter? He certainly will not so contend. Then if such is not the law, to do so is error. But "H. S. K." says if it is an error, it is one in favor of the accused, and hence he can not complain. "H. S. K." is complaining because the Supreme Court, whose duty it is to exercise a superintending control over the circuit courts, in sending a case back for a new trial, points out a palpable error committed by the trial court on a former trial. Such apparent restiveness of the circuit bench is an ill-omen, and squints at an unhealthy insubordination from that quarter. The state has rights as well as the accused, and although her officers can not correct the errors of the trial court in giving instructions, by appeal or writ of error, still where they have been committed on a first trial on account of other errors, the Supreme Court would be remiss if it failed to point them out. J. H. S.

TRENTON, MO., March 11, 1878.

BOOK NOTICES.

A DIGEST of Volumes 69 to 83 inclusive, of the Decisions of the Supreme Court of Illinois, as reported by HON NORMAN L. FREEMAN, with Table of Cases and Table of Contents. Compiled and Arranged by EDWARD J. HILL. Chicago, Illinois: Chisholm Brothers. 1878.

THE CRIMINAL CODE OF OHIO, with Forms and Precedents for Indictments, Informations and Affidavits, Forms for Writs, Docket and Journal Entries, and Digest of Decisions. By MOSES F. WILSON. Cincinnati: Robert Clarke & Co. 1878.

SAYLER'S AMERICAN FORM BOOK, containing the most improved legal forms and instruments for the use of professional and business men; also a statement of the Law of Deeds, Mortgages, Chattel Mortgages, Exemption from Execution, Interest, Mechanics Liens, Wills; with Forms for every State and Territory. By J. R. SAYLER, Counselor-at-law. Cincinnati: Robert Clarke & Co. 1878.

The above three volumes are all handsomely printed and well bound, the two first in sheep, the last in cloth. The mechanical execution of the Illinois digest is really excellent, and is very creditable to the enterprise of the Chicago house whose imprint it bears, and whose work we, for the first time, have become acquainted with. It is as good as could be wished, and is not excelled even by the older and better known Cincinnati firm, by whom the Criminal Code and Book of Forms have been issued.

The cases digested by Mr. Hill were decided by the Supreme Court of Illinois during three years, from the September Term, 1873, to the same term in the year 1876. A digest every three years would seem to be rather uncalled for; but the present volume is explained by the fact, that during that period the state reporter has issued no less than fifteen volumes, and that the cases in these volumes cover forty-three pages of the digest. The table of contents includes forty-seven pages, and the book itself seven hundred and ninety-seven. The digest of Wood and Long, with the supplement of 1876, brings the Illinois decisions down to volume 68, where Mr. Hill's digest begins. Any one who finds it necessary to consult the last fifteen volumes of the Illinois reports will be unable to do without it. Mr. Hill is to be congratulated upon the faithfulness and ability with which he has performed the severe and exacting labors which one who undertakes to make a satisfactory digest takes upon himself.

An annotated edition of the Penal Code of Ohio, adopted by the general assembly May 5th, 1877, must be of great value to every criminal lawyer in that state. The author, following in the arrangement of his work the Code itself, has presented its different sections in

the order which the practitioner has become familiar with, and has supplemented them with the decisions of the Ohio courts and with the necessary forms. The work contains 586 pages, and a good index. Nearly three hundred cases are cited. The forms are numerous and complete. The contents of Mr. Sayler's book can be sufficiently seen from its title page. Its object is to provide a comprehensive, clear, and reliable form book for professional and business men in the several states of the Union. Forms for all the more important classes of transactions, and especially such as require to be performed with legal precision, are given, with such instructions and directions as the practice and laws of the respective states relating to the same seem to demand. We believe the work to be accurate and reliable.

Even if he do nothing more, the maker of a digest or the compiler of a book of forms, which the profession can safely depend on, is entitled to thanks. He becomes the designer of a time-saving machine, for the benefit of a profession which greatly needs something of that sort. In every business, or profession or trade save one, necessity has compelled and invention has provided the means for doing with one man, and in one hour, what formerly took a score of men and a whole day to accomplish. The improvement of machinery has, in this respect, affected in an almost equal degree the merchant, the manufacturer, the agriculturist and the artizan. The surgeon, too, has his improved instruments, with which he may set or amputate a limb with a speed which medical science two hundred years ago did not dream of. And all these circumstances have so influenced modern ideas, that even the minister is forced to shorten his sermons, and where our ancestors would sit patiently for a whole forenoon, we commence to yawn at the end of half an hour. But while nearly all the world has thus been moving, the legal profession has—we were going to say—stood still. But to say this would hardly be the truth; to show its exact position something more must be added. It has certainly not gone with the stream; nor has it attempted to stem it. The fact is, as we shall presently show, that silently, without having been noticed by many, it has under the shelter of the shore been sailing, and is now sailing, up the stream and against the current. Our foreign critics, in uniting upon the legal profession as the conservative element of this country, have really fallen into an error. Conservatism means to remain where you are, to guard the customs of the past, and to cleave to the maxims of your ancestors. It means a state of rest which abhors change, and that, regardless of whether it shall bring more labor or more ease, greater liberty or a more complete despotism. We speak here of the lawyer in his profession, not of his influence upon politics. In the latter relation, the expression which we are criticising may be, and probably is, correct.

To test the truth of what we have said, it is only necessary to consider how far the march of improvement, to which we have referred, has benefited or has been participated in by the legal profession. One not acquainted with the subject would probably conclude that, as it takes fewer hands and less labor to build a bridge or weave a carpet or reap a crop than it did a hundred years ago, it would consequently require less labor on the part of lawyers and courts to arrive at the equity and to decide finally a dispute between citizens, to settle which the aid of the law had been invoked. Yet were he to examine the subject ever so cursorily he would not fail to see the falsity of his proposition. He would, without much trouble, discover the error into which he had fallen, and without, perhaps, understanding the reason for it. But of this he would be certain, viz., that there are more lawyers than formerly; more law, more long-windedness, not fewer technicalities, and hardly less delay. But though the non-professional men might fail to give the proper explanation for the phenomenon, the cause is obvious enough. It lies in the enormous growth of precedents. The lawyers of old investigated principles, the reported cases were few, the principles themselves were few, and it might be affirmed with confidence that it did not occupy the advocate of two hundred years ago a longer time in thinking out the arguments in a case before him than it did the theologian to compose his sermon. But the lawyer of the present day never feels confident of his case unless he is sure that he has found all the reported authorities upon it, and to do this he must, by some means or other, search thousand of volumes of reports. To accomplish this he is, to some extent aided by just such books as are before us as we write, and which we have designated as labor saving. Thus, in the practice of the law, has thought given place to research. Ninety-nine lawyers out of a hundred will tell you that the reported decision of any judge, no matter where or when, no matter how much of a jurist he may have been, is more potent with nine out of ten courts than any amount of reasoning and logic.

Not only has the labor of preparing a case gradually become more and more arduous; but the time necessary to dispose of it has correspondingly lengthened. The limitations of the right to cross-examine have been almost all removed; the witnesses in a case of any importance are legion, and the *clepsydra* by which the time of the advocate was measured, is unknown to our courts. A hundred years ago the most important trials scarcely ever lasted more than one day; if they took two days it was regarded as extraordinary. Now a case of any notoriety—and these are the ones which are noticeable—seems to drag on endlessly and furnishes items for the newspapers and food for the non-fastidious for months. The Tichborne and Beecher cases have no parellels in former days, not even in such *causes celebres* as the trials of Warren Hastings and Aaron Burr.

It is for these reasons that we welcome the publication of such books as these, and we have grouped them together as belonging to the same *genus*, and deserving the same notice. We repeat, as our opinion, that the author who, content to be useful rather than to appear learned, discards the oft seductive wish to be known as the author of a treatise, and is satified to lessen the labor of the profession by rendering easier what we might term the mechanical part of the practice of the law—the search after precedents—has rendered no common service to the profession, and has, in truth, deserved well of his brethren.

QUERIES AND ANSWERS.

[In response to many requests from lawyers in all parts of the country, we have decided to commence again the publication of questions of law sent to us by subscribers. We propose to make this essentially a subscriber's department—*i. e.*, we shall depend, to a large extent, upon them to edit this column. Queries will be numbered consecutively during the year, and correspondents are requested to bear this in mind when sending answers.]

QUERIES.

9. LANDLORD AND TENANT — JUSTICE COURT—BOND.—A, a landlord, sues B, his tenant, for rent and possession and obtains judgment for two months' rent and possession. B appeals and gives bond to cover six months' rent. Can A begin suit for the next months' rent when due irrespective of the case appealed? And is it within the province of a justice to take any bond he please, and to cover more than the judgment obtained? A case of this kind was recently decided by a justice of this city, which decision prevents a landlord from commencing a new suit for next month's rent

when due, while a case (for the prior months' rent and appealed with bond for six months' rent) is pending in the circuit court. The question has a great deal of interest, especially with real estate men and landlords.

T.

ANSWERS.

No. 3.

(6 Cent. L. J., 159).

I would refer the querist to the case of Patterson v. Crawford, 12 Ind., 241. In this case Armstrong, assignor of the appellee, was convicted of grand larceny and sentenced to hard labor in the state prison for a term of 5 years. Before his term of imprisonment expired, he was released upon a writ of *habeas corpus*, and finally discharged, upon the ground that the court trying him had no jurisdiction of the offense. Suit was brought by his assignee, for his (Armstrong's) work and labor, done and performed by him during his confinement, for the lessee of the state prison. The court below rendered judgment for the full amount of the claim, and the supreme court affirmed the judgment.

Lawrenceburg, Ind. W. H. BAINBRIDGE.

NOTES.

ON the 22d ult., as Sir George Jessel, Master of the English Rolls Court was alighting from his cab at the court door, he was shot at with a pistol in the hands of a lunatic, who had a few days before been removed from the court by his order. The bullet grazed the ear of the judge. The man was immediately arrested. On taking his seat on the bench, the judge remarked that assaults on civil judges in England have been extremely rare. The *Solicitors Journal* can not recall within the last few years any instance of an assault on a judge in a civil court more serious than that perpetrated by the man from Texas, who discharged at Vice-Chancellor Malins an egg of dubious freshness. But in 1616 Sir John Tyndal, one of the Masters in Chancery, was killed by a shot fired at him while entering his chambers at Lincon's-inn by a man called Bertram, against whom Sir John had given a decision. The assassin was examined before the Attorney-General and Solicitor-General "according to special directions given by his Majesty in that behalf," but committed suicide before he could be punished (see 2 Morant's History of Essex, 281). A few years later a very severe and summary punishment was inflicted on a ruffian who attempted to injure a judge of assize. Chief Justice Richardson, at the assizes at Salisbury, in the summer of 1631, was assaulted by a prisoner, condemned there for felony, who, after his condemnation, threw a brickbat at the judge, which narrowly missed him. For this an indictment was immediately drawn by Noy against the prisoner, whose right hand was forthwith cut off and fixed to the gibbet upon which he was himself immediately hanged in the presence of the court (see 2 Dyer, 188b).

MR. THOMAS CHITTY, the well-known pleader—we wonder how many lawyers there are in this country who are not familiar with the name of Chitty—has just died in his 77th year. He was a member of a family of distinguished lawyers. His father, says the *Law Times*, was an eminent member of the Bar in the early part of the century, and was the author of a large number of law books, some of which are still cited as authorities. Mr. Chitty was never called to the Bar. He practiced as a special pleader, and his very large business attracted to his pupil-room a crowd of students. Among those who read with him were Lord Chancellor Cairns, Lord O'Hagan, Chief Justice Whiteside, Mr. Justice Willes, Mr. Justice Quain, and Sir James Hannen. He was the editor of "Chitty's Practice," which passed through some dozen editions, and was long the handbook of practitioners of the old school. The book survived, and for a time defied the sweeping changes in procedure which commenced in 1852, and though the judicature acts have to some extent diminished its value, it is still highly useful, as so much of the old practice is preserved, and it will long remain a memorial of the industry and research of its editor. Mr. Chitty was also editor of Burns' "Justice of the Peace," of which Mr. Justice Willes used to say that it contained better law on nearly every subject than could be found in any other text book. Mr. Chitty began his practice below the Bar in the year 1819, at an unusually early age. He rose rapidly into a large business, and continued hard at work until the close of last year, when his strength suddenly failed him. He was an eminently bright, cheerful, kindly man, much beloved by his old pupils and numerous friends, and his long and honorable career had secured for him universal respect and good will in his profession. He retained almost to the last his active habits and quickness of intellect.

THE most considerable event which has transpired in legal circles in this city during the present year, is the disbarment of Mr. Frank J. Bowman, which took place in the circuit court last Monday. It attains this prominence not so much from the position of the defendant, whose notoriety is happily but local, as from the remarkable manner in which the prosecution was instituted, and has from beginning to end been conducted. It was strictly neither a public nor a private proceeding: in the peculiar features of each it was wanting. In the conduct of the case nothing was more marked than the absence of that personal feeling which distinguishes a private quarrel, unless it were the lack of that popular support without which a public prosecution must certainly fail. Despite the frequent assertions of the defendant that he was the victim of a persecution, it is certain that to an outsider the dignified and judicial style in which the prosecution was carried on was most striking. It was the case of a body of professional men, the leading and most honored members of the profession—it would be a difficult matter, leaving out the defendant's counsel, to find a lawyer of any standing who does not indorse the course of the Bar Association—uniting together in a common effort to prove to the public that the ancient honor of the profession is still more than a mere name. Another feature of the prosecution was the exceptional character of the jury which passed upon the facts of Mr. Bowman's case. It is seldom that such a jury is seen in a St. Louis court room, composed, as it was, of leading citizens, merchants, manufacturers, millionaires. The verdict was not unexpected; but the sentence, outside of the profession, has excited surprise. The public had long since come to the conclusion that the defendant would in some way or other "get ahead of them yet.". The defendant, if the newspapers reported him correctly, regarded the verdict as a vindication, and probably looked for a tribute from the court instead of the severest reprimand which it had power to give. But he ought not to complain. In the judge before whom his case was heard, in the eminent jurist and his associates who conducted the prosecution, and in the skilled advocates who defended him, he had all he could ask for. In the jury which returned the verdict he had even more; for all he was entitled to was a jury of his peers. But perhaps it is too much to expect from him that "good opinion of the law" which the poet has celebrated in a couplet and which may be presumed to be wanting in the attorney who betrays his trust.